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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA, *Respondents*.

On Writ of Certiorari to The United States Court Of Appeals for the District of Columbia Circuit

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BRIEF FOR THE DOW CHEMICAL COMPANY AS AMICUS CURIAE

This brief is submitted by The Dow Chemical Company (Dow) in support of the position of the respondents City of Lafayette, Louisiana and City of Plaquemine, Louisiana (Cities). It is accompanied by written consents of all parties.

INTEREST OF THE AMICUS CURIAE

To supply the electric power requirements of its chemical plant at Plaquemine, Louisiana, Dow owns and operates its own generating units. Like any company with a single source of generation, Dow requires a connection with a neighboring utility with arrangements for backup power and exchange of economy energy in order to insure reliability and maximum economy. Until recently, Dow had a connection with Gulf States Utilities Company (Gulf States) but severed the relationship because Gulf States was unwilling to supply the type of service required.

Dow is a party to an Interconnection and Pooling Agreement with Cities and the Louisiana Electric Cooperative (LEC) (J.A. pp. 82-106) which, once effective, will provide backup for each system and will permit economy energy exchanges among the pool members. The gravamen of the protest by Cities against approval of Gulf States' financing was that the funds would be used in furtherance of a conspiracy (successful up to now) by Gulf States and other investor-owned utilities to prevent the pooling agreement from becoming effective by (1) preventing LEC from building the transmission lines contemplated thereby and (2) refusing to transmit power for the parties thereto over their own lines.

Subsequent to the decision of the court below, Gulf States sought, in FPC Docket No. E-7567, authorization to issue $35,000,000 principal amount of first mortgage bonds and 2,000,000 additional shares of common stock. Cities filed a Protest and Petition to Intervene in that proceeding also. By order dated November 4, 1971, FPC determined that that Protest and Petition for Intervention should be accepted and

handled as a complaint and instituted an investigation to which it assigned FPC Docket No. 7676. Dow has intervened in and is now a party to the latter proceeding.

Dow's interest is similar to that of Cities but with one important difference. Dow is not a competitor of Gulf States but a consumer and is therefore a member of the public whose protection is the ultimate objective of the antitrust laws. *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30.

QUESTION PRESENTED

Whether, in considering an application for authorization to issue securities under Section 204 of the Federal Power Act, FPC can refuse to consider a substantial contention, properly raised, that the proceeds of the sale of the securities will be used for the unlawful purpose of suppressing competition in violation of the antitrust laws.

STATUTES INVOLVED

Sections 10(h) and 204(a) and (b) of the Federal Power Act (16 U.S.C. §§ 803(h), 824c(a)(b)) are included in the Appendix to this brief, *infra* App. 1-2.

SUMMARY OF ARGUMENT

Section 204 of the Federal Power Act requires FPC to determine whether an issue of securities is in the public interest and also whether the proceeds will be used "for some lawful object" and to impose appropriate conditions to insure that this is done. Nothing in the legislative history detracts from the plain meaning of this language.

Cities have presented a substantial contention that part of the proceeds of a securities issue will be used for an unlawful object—the furtherance of a conspiracy to prevent Cities, Dow and LEC from making effective a pooling arrangement which would permit the mutual exchange of backup and economy power—and have asked that approval be appropriately conditioned to prevent the use of the proceeds for that purpose.

The prevention of anti-competitive effects must be considered by an agency as part of the public interest unless Congress has clearly indicated that "public interest" must be more narrowly construed in a specific situation. While the legislative history of Sec. 204 of the Federal Power Act may indicate that a major concern of Congress was with the financial stability of utilities, there is nothing in the legislative history indicating that Congress intended that FPC consider only this question and ignore every other facet of public interest.

The decision of the court below was a reasonable accommodation between the need of the issuer for prompt consideration and the need of the party injured for relief from anti-competitive action. The court below gave FPC all the flexibility it required, permitting it even to approve the issue without a hearing so long as it made arrangements to take the problems into account in the disposition of another application within a reasonable time.

There is no merit to the argument that other avenues of relief are open to aggrieved parties. Neither a suit for treble damages nor other available remedies is an adequate substitute. What Dow, Cities and LEC need is access to the transmission systems of the investor-owned utilities for the transfer of power be-

tween themselves as a substitute, however inadequate, for the use of the transmission line which LEC proposed to build and was prevented from building by the activities of Gulf States and its co-conspirators. FPC has ample authority to require that such access be provided as a condition of authorization to issue the securities.

ARGUMENT

I.

The Allegations That the Proceeds Will Be Used for an Unlawful Object Are Substantial

It should be emphasized at the outset that there is nothing insubstantial about the contention of Cities (with which Dow is in complete agreement) that part of the proceeds of Gulf States' issuance of securities will be used for an unlawful object.

The Louisiana electric power industry consists of 5 investor-owned utilities, 29 municipalities and 14 cooperatives.[1] Some of the municipalities, including Cities, generate all or part of their own power requirements. LEC is a generation and transmission cooperative created to supply the power requirements of its member cooperatives. The transmission grid is owned by the investor-owned utilities.

By reason of the increase in the size of generating units, it has become impossible for a municipality, or other small utility, to furnish reliable and economical power to its customers by operating as an isolated system, relying entirely on its own generation. It must, of necessity, have access to other sources of power, at

[1] *Electrical World Directory of Electric Utilities* (1972-73 Ed.), p. 307.

least for the purpose of obtaining backup power.[2] As the owner of an isolated generating plant, Dow is in a position similar to that of a small utility.

The ownership of the transmission grid by the investor-owned utilities drastically reduces the sources of power available to other power systems. Any other power system is a captive customer of the nearest investor-owned utility unless it builds a transmission line or can arrange with the investor-owned utilities to transmit power for it. Thus, Lafayette is interconnected only with Central Louisiana Electric Company, Inc. (CLECO), and Plaquemine is interconnected only with Louisiana Power and Light Company (LP&L). Until recently, Dow was connected to Gulf States but it terminated the interconnection agreement because Gulf States used, and abused, its monopoly position to impose an economic penalty on Dow greater than that incurred by isolation of its generating units.

In order to provide power to its members, LEC began construction of a generating plant at New Roads, Louisiana. It also proposed to build a transmission line to permit transmission to its members and exchange of power with Cities and Dow in order to obtain the benefits of coordinated operation for LEC, Cities and Dow pursuant to the pooling agreement.

Dow supports fully the contentions of Cities that Gulf States and other investor-owned utilities undertook to destroy LEC by concerted action, using such devices as baseless lawsuits, public relations drives, lobbying and efforts to influence administrative officials. These efforts delayed construction of LEC's

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[2] See *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 402 U.S. 515.

generating plant and culminated in action by the REA Administrator withholding funds committed to LEC for construction of the transmission line but with the understanding that the investor-owned utilities would transmit power for the members of the pool.

Long drawn out negotiations ensued but the investor-owned companies have not agreed to transmit power for the pool members. Ultimately, in order to dispose of the power at its plant, LEC entered into an "interim agreement" with Gulf States, CLECO and LP&L to turn over to them control of the generation at the plant, all of which will be delivered to the companies' system. In return, the companies agreed to transmit power to some of LEC's members and constructed additional transmission facilities for that purpose.[3]

The foregoing agreement is the latest step in the concerted effort of Gulf States and its co-conspirators to maintain a monopoly in bulk power supply and transmission and to keep the pool members in a captive state. It is believed that some of the proceeds of the issuance of the securities by Gulf States will be used to carry out this agreement.[4]

The furtherance of a conspiracy to monopolize and to divide markets is not a lawful object. *Burke* v. *Ford,* 389 U.S. 320. As discussed more fully *infra,* pp. 8-16, Section 204 of the Federal Power Act permits ap-

[3] This agreement was filed with FPC as a rate schedule (FPC Docket No. E-7696). By order dated August 7, 1972, it was accepted "pending final determination of the issues set for hearing in Docket No. E-7676."

[4] That the allegations of Cities are not insubstantial is indicated by the fact that the Department of Justice has served Civil Investigative Demands upon Gulf States and other Louisiana investor-owned utilities.

proval only of securities issued for a "lawful object" and authorizes FPC to condition the use of the proceeds. It is reasonable for Cities to ask, and we think FPC has a duty to require, that use of the proceeds of the issue of securities for carrying out the agreement with LEC be conditioned upon cessation of the conspiracy and an undertaking by Gulf States to provide the pool members with a reasonable alternative to the benefits they had provided for themselves in the pooling agreement.[5] This could be accomplished by a requirement that energy be transmitted over the companies' system for the pool members at a reasonable and non-discriminatory rate.[6]

II.

FPC Had a Duty To Consider Cities' Allegations in a Sec. 204 Proceeding

What was the duty of FPC when faced in a Sec. 204 proceeding with (1) substantial allegations that the proceeds of the securities would not be used for a lawful object but in furtherance of an unlawful conspiracy, and (2) a request that any approval of the issue of the securities be conditioned by a requirement that Gulf States take action to eliminate, or at least reduce

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[5] The fear expressed by FPC that affirmance of the decision of the court below would require FPC to consider "attenuated antitrust allegations" under Sec. 204 is groundless. We do not contend, and the court below did not hold, that FPC needs to consider claims which are not substantial. The type of claim which FPC purports to fear would not require a hearing but could be disposed of summarily. *Citizens for Allegan County, Inc.* v. *Federal Power Com'n*, 414 F.2d 1125 (D.C. Cir.); *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 498.

[6] It should be noted that Cities have not asked (and Dow is not asking) that FPC enforce the antitrust laws "as such", as FPC and Petitioner seem to suggest. (FPC Br., p. 19, Pet. Br., p. 29)

for the future, the injury to Cities, LEC and Dow resulting from the alleged unlawful actions?

Section 204 of the Federal Power Act directs FPC to authorize an issue of securities only if it finds:

> that such issue . . . (a) is for some lawful object, . . . compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility . . . and (b) is reasonably necessary or appropriate for such purposes.

The Act further provides that the Commission may grant an application:

> . . . in whole or in part, and with such modifications and *upon such terms and conditions as it may find necessary or appropriate,* and may . . . by . . . supplemental order modify the provisions of any previous order *as to* the particular purposes, uses and extent to which, or *the conditions under which,* any security so theretofore authorized or *the proceeds thereof may be applied* . . . (emphasis supplied)

On its face, the foregoing provisions appear to require clearly that FPC consider substantial allegations that the funds may be used for a purpose which is not a "lawful object" and, if the allegations are sustained, that it impose appropriate conditions requiring that the proceeds be applied only to lawful objects.

The briefs of FPC and Petitioner focus on the "public interest" language and ignore the requirement that the proceeds be used for a "lawful object." But if the focus is on "public interest" the answer is the same. Their arguments proceed from a basic fallacy—that the term "public interest" should be narrowly con-

strued to exclude anti-competitive effects unless Congress has clearly demonstrated a contrary intent. The law as heretofore enunciated by this Court and lower federal courts is directly to the contrary. The existing law is summarized in *Cities of Statesville, et al.* v. *Atomic Energy Commission,* 441 F.2d 962, 987 (D.C. Cir.) (Concurring Opinion):

> It is a fair synthesis of the cases that a statute providing for licensing *or other regulation* is presumed to permit consideration of antitrust principles . . . unless a contrary intent appears expressly or by necessary implication. (emphasis supplied)

In a variety of cases involving several federal regulatory agencies, this Court and lower federal courts have repeatedly held that the principles of the antitrust laws are an essential part of the public interest and that federal agencies must consider anti-competitive effects in determining whether a proposed action is consistent with the public interest. Many of the cases are collected in the opinion of the court below (454 F.2d 941, 948, Fn. 9) and in *Cities of Statesville* v. *Atomic Energy Commission, supra* (p. 986).[7]

We are not suggesting that the term "public interest" necessarily requires a consideration of antitrust implications in all circumstances. Congress has sometimes made clear that antitrust effects are not to be considered in specific situations as, for example, in

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[7] *Cf. Carnation Co.* v. *Pacific Westbound Conf.,* 383 U.S. 213, 218, in which this Court noted:

> We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.

the Atomic Energy Act where Congress, by expressly requiring antitrust review of applications for commercial licenses under Sec. 103 of the Act, made clear that it did not intend to require antitrust review in connection with research and development licenses under Sec. 104 of the Act (42 U.S.C. §§ 2133-2135) *Cities of Statesville* v. *Atomic Energy Commission, supra.*

There is nothing in the Federal Power Act or in its legislative history which indicates that Congress intended that FPC, in administering Sec. 204, ignore anti-competitive effects in determining where the public interest lies. Both FPC and Petitioner discuss the legislative history but the most that can be argued in support of their position is that the legislative history is neutral.[8]

There is, however, support in the legislative history for the proposition that Congress affirmatively demonstrated its intention that FPC consider anti-competi-

[8] In an effort to find some support for the theory that Congress affirmatively indicated an intent that FPC not consider anti-competitive effects, Petitioner argues on the basis of an excerpt from the testimony of FPC's Solicitor (Pet. Br., p. 16), that Congress did not intend to preserve competition in the electric power industry. There are at least three things wrong with this argument. 1. Assuming, *arguendo,* that Congress did not intend to encourage utilities to compete for retail customers by raiding each other's territory, it does not follow that it intended to sanction a conspiracy to monopolize and divide the markets for bulk power supply and transmission. 2. The argument proves too much. It would require FPC to ignore anti-competitive effects in administering *all* provisions of the Act. FPC concedes that it must consider such factors in administering all of the Act's other provisions (FPC Br., pp. 13-14). 3. The quotation is taken out of context. The entire colloquy is included in the Appendix to this brief. It shows only that the witness was floundering in trying to explain what was intended by Sec. 202(a) of the House bill (H.R. 5423).

tive effects in administering all sections of the Act. Sec. 10(h), which was enacted as part of the original Act, provides:

> That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

As part of the 1935 Amendments which added Part II to the Federal Power Act, Congress amended and reenacted Section 10 but with no changes in subsection (h). Congress thus considered and reaffirmed the policy against anti-competitive action. Had Congress intended to except Sec. 204 from this policy, one would have expected it to do so expressly.

It may be true that Congress was focusing attention primarily on preventing the issuance of securities which might impair a company's financial integrity, but that does not mean that Congress intended that all other public interest considerations should be ignored. In the absence of a showing of an affirmative Congressional intent that public interest, as used in Sec. 204, be construed to exclude anti-competitive effects, Petitioner and FPC are driven to arguing that FPC can consider *no* aspect of public interest except whether "the issuance of securities . . . might impair the company's financial integrity or its ability to perform its public utility responsibilities" (FPC Br., p. 21, Pet. Br., p. 10).[9] Precisely the same argument was made with ref-

[9] Implicit in this argument is the contention that FPC must blind itself to the uses which Gulf States proposed to make of the proceeds. How this can be reconciled with the authorization to the Commission in Section 204(b) to specify the purposes for which and the conditions under which the proceeds of the securities may be applied is never explained.

erence to § 20a of the Interstate Commerce Act in *Denver & Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485. In response to that argument, this Court stated:

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation. Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anti-competitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anti-competitive effects. (p. 492)

If attention is focused on the requirement that the proceeds be used for a lawful object rather than on the public interest requirement, the situation becomes even clearer. By no stretch of the imagination can it be argued that a conspiracy among investor-owned utilities to monopolize the market for bulk power supply and to divide the market so as to make each municipality the captive of a particular company is a lawful object, *supra*, p. .

FPC argues than antitrust violations can be considered by it in proceedings under every other section of the Act and draws the conclusion that the availability of a forum under other sections of the Act makes it unnecessary for an aggrieved party to intervene in a

Sec. 204 proceeding. As explained, *infra* pp. 15-16, this is not so, but, in any event, the conclusion to be drawn from the above premise would seem to be that Congress intended FPC to be alert to antitrust problems in administering *all* the sections of the Act. It is scarcely logical to assume that Congress, without expressly saying so, would have exempted a single section from the general mandate to consider anti-competitive effects in administering the Act.

Both FPC and Petitioner express grave concern about the delay involved in considering antitrust allegations in a Sec. 204 case. The court below recognized this problem and reached a reasonable accommodation between the needs of the issuer for prompt consideration and the need of the party injured for prompt relief from anti-competitive action. The court stated:

> We are aware too, of the pertinence of the comment of FPC's counsel, that security issues to provide funds for a utility's construction must be decided in a time frame much more limited than that often contemplated for antitrust litigation. But the doctrine of public interest consideration does not contemplate that an agency will be engaged in a determination of antitrust issues as such.
>
> In the context of a particular matter, it may become evident that the agency may approve forthwith a large portion of the application, and the use of the funds contemplated thereby, while reserving decision on the difficult issue. Indeed even an entire application may be approved if the agency stands ready to proceed with hearing and consideration of the anticompetitive issues, and to take the problems into account in the disposition of another application projected for presentation to the agency within a reasonable time. (p. 953)

FPC has more than taken advantage of the leeway thus granted to it. Instead of resolving Cities' contentions in the pending or in a subsequent Sec. 204 proceeding, it decided to treat Cities' intervention in a subsequent proceeding as a complaint and assigned it a separate docket number.[10] The complaint docket is now proceeding at a leisurely pace and all proceedings therein have been stayed by FPC over our protest pending the determination of this case.[11] We think FPC was in error both in refusing to consider Cities' allegations in a Sec. 204 proceeding and in staying the complaint proceeding pending final action in this case. A major advantage of considering anti-competitive allegations in a finance case is that the pressures of time require that the issues be disposed of promptly. This Court is fully aware of the opportunities for delay presented in the ordinary proceeding. Relief in the existing complaint proceeding is a long way down the road. Had FPC undertaken to resolve the anti-competitive issues in a Sec. 204 proceeding, we are satisfied that they would have been resolved long before this.

The argument is also made that the aggrieved parties do not need relief under Sec. 204 because other avenues of relief are available to them, including action by the Department of Justice and treble damage suits. The short answer is that no other remedy presents an

[10] Protests by Cities and Dow against still a third application for authority to issue securities (FPC Docket No. E-7682) and in FPC Docket No. E-7696 (*supra*, p. 7) were also treated as complaints and consolidated with FPC Docket No. E-7676.

[11] Following the initiation of the proceeding in Docket No. E-7676, extensive discovery procedures were undertaken, involving considerable time and expense. The issuance of the stay order interrupted this essential procedure, and will cause even greater delay and expense once the proceeding is reactivated.

acceptable alternative. Dow has no interest in whether Gulf States is criminally prosecuted. Dow's interest is in manufacturing chemicals at a reasonable cost. It generates its own power to serve its basic load but it needs to obtain supplementary power and seeks to obtain it at rates and under terms and conditions dictated by the forces of competition between alternative sources of supply—Gulf States, other investor-owned utilities and the other members of the pool. A treble damage suit after the fact would be a poor substitute for an order from FPC conditioning approval of the issuance of securities upon the transmission of electric power for Dow on reasonable and nondiscriminatory terms. An independent proceeding before the Commission, as in FPC Docket No. E-7676, is an alternative, it is true, but not a satisfactory one. A proceeding of this kind provides ample opportunities for delay, as indicated by the tortoise-like progress of the present proceeding. In such a proceeding, we face, moreover, the position adopted by FPC in *City of Paris* v. *Ky. Utilities Co.*, 41 F.P.C. 45 that it lacks authority to order a utility to wheel electric power.[12] Assuming that FPC adheres to this position, Dow will be faced with the necessity of going to court before it can obtain effective relief. In the meantime, the operations at Dow's Plaquemine plant will continue to suffer.

III.

FPC Authorization To Issue Securities Should Be Appropriately Conditioned for the Protection of Cities and Dow

Dow recognizes that the Commission's authority to impose conditions on the use of proceeds of securities

[12] Compare FPC's statement quoted at p. 31 of Petitioner's brief with the assurances in the FPC brief (pp. 13-15) that Cities can obtain relief in the complaint proceeding if they sustain their allegations.

is not unlimited. *United States* v. *Chicago, M., St. P. & R. Co.,* 282 U.S. 311 (see, Pet. Br., p. 22). It is not true, nevertheless, that conditions which would provide relief to Dow and Cities would be beyond FPC's authority. We believe that FPC has authority to grant all the relief necessary in a complaint proceeding but, even if it did not, it would not follow that the relief could not be granted by conditioning the approval of a security issue. Any conditions which FPC might impose would need to be appropriate but the power to impose conditions is broader than the statutory authority to grant relief in a complaint proceeding. *Atlantic Refining Company* v. *Public Service Commission of N.Y.,* 360 U.S. 378; *Federal Power Commission* v. *Hunt,* 376 U.S. 515; *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223; *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353 (D. Colo.), *aff'd per curiam* 404 U.S. 802, *reh. den.* 404 U.S. 987; *Texaco, Inc.* v. *Federal Power Commission,* 290 F.2d 149 (C.A. 5). *Cf. Russell* v. *Farley,* 105 U.S 433.

In *Texaco, Inc.,* the Court of Appeals for the Fifth Circuit stated the rule as follows:

> . . . the power of the Commission to condition a certificate is co-extensive with its power to reject or deny a certificate, . . . [because] . . . the power to reject an application for certificate completely is harsher than the power to grant it on any reasonable condition. (p. 156)

So also the power of FPC to refuse to authorize an issue of securities where the proceeds are to be used for an unlawful object includes the power to grant the authorization on conditions reasonably adapted to cure the evil which otherwise would require denial of the authorization. The precise condition will need to be

determined by FPC after hearing but a condition requiring Gulf States to transmit power for the members of the pool on a reasonable and non-discriminatory basis would seem to be both necessary and appropriate.

CONCLUSION

Section 204 of the Act requires the Commission to determine whether the proceeds of a security issue will be used for a "lawful object" and to impose appropriate conditions which will insure that they be used for that purpose. Faced with a substantial contention that the proceeds of an issue of securities would be used for the unlawful purpose of suppressing competition in violation of the antitrust laws, the FPC had a duty to consider such allegations, and, if they were found to be true, to impose conditions appropriate to insure that the proceeds would not be used for such unlawful purpose.

The decision of the court below should be affirmed and this Court should make clear that Cities' allegations must be considered by FPC in a Sec. 204 proceeding and relief must be granted in that proceeding if the allegations are sustained.

Respectfully submitted,

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